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No. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT, *et al.*,
Petitioners,

v.

WINNIE TEAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS TO FILE A BRIEF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in the instant case.

The AFL-CIO is a federation of 102 national and international unions with a total membership of approximately 14,500,000 workers. The men and women who belong to AFL-CIO unions are drawn from every race, religion and national origin. Precisely to assure each of

them the equal employment opportunity that is his or her natural right, the AFL-CIO was a moving force in the enactment of Title VII of the Civil Rights Act of 1964.

This case presents a question as to whether Title VII does provide that opportunity, or whether the Act permits employers to engage in practices that under settled analysis are discriminatory if the employer is nevertheless able to achieve an appropriate racial balance. That question is central to the meaning of Title VII. The concept of an employment policy designed to achieve racial balance and the concept of a non-discriminatory employment policy are incompatible. And, as we show in the accompanying brief *amicus curiae*, Congress' intent in enacting Title VII was to prohibit racial discrimination, not to mandate racial balance. Because the question here is of such moment to the proper implementation of Title VII, the AFL-CIO seeks this opportunity to state its views to the Court.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended in 1972, is an anti-discrimination statute, designed to protect *individuals* against racial, religious, sexual and national origin discrimination in employment. And § 703(j) of the Act makes it plain that Title VII does

not require employers to achieve a racial balance in their workforces. Thus, ending "discriminat[ion] because of race," not achieving racial balance, is the command of Title VII.

Under the "bottom-line" theory, urged upon this Court by the State (the employer) and by the United States as the basis for reversing the court of appeals, acts of discrimination against individuals in promotion—at least where the discriminatory act is of the type dealt with under the disparate impact doctrine—are to be countenanced if an appropriate racial balance among those promoted is nevertheless achieved. In this case, the theory would mean that individual blacks victimized by a discriminatory test must go without a remedy because *other* blacks, not so victimized, were given a promotion as a result of dispaarte treatment victimizing whites. The theory thus reduces in this setting to the proposition that two wrongs make a right; a statute designed to prohibit and remedy discrimination against individuals, not to achieve racial balance, is turned into a statute that tolerates multiple acts of discrimination as long as the result is a racial balance.

This Court has on several occasions rejected the bottom-line theory as a defense to claims by victims of disparate treatment. *Furnco Construction Corp. v. Waters*, 438 U.S. 567; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273; *Phillips v. Martin Marietta*, 400 U.S. 542. The proponents of the bottom-line theory urge that the result should be different when the individual's claim of discrimination is of a disparate impact violation, rather than of a disparate treatment violation. The analytic error that underlies this attempted distinction is the implicit assumption that the prohibition against disparate impact serves a different statutory purpose from that served by the prohibition against disparate treatment. Those who advocate the bottom-line theory proceed as if disparate impact analysis is a means for

achieving appropriate racial balances, rather than a means to prohibit and to remedy a particular type of discrimination against individuals. On this view, the disparate impact doctrine is at war with the basic approach of the statute. But disparate impact analysis is not simply a numbers game; as *Griggs v. Duke Power Co.*, 401 U.S. 424, and its progeny show, it is designed to address a particular and subtle form of employment discrimination.

While this Court has not yet drawn the precise boundaries of the disparate impact analysis, certain limits are clear. The analysis is meant to address the class of employment practices, that, while not designed or adopted in order to discriminate on the basis of race, are predicated on factors that are "artificial, arbitrary, and unnecessary" and that, because they are "traceable to race" and therefore "beyond [the] control" of the disadvantaged individuals, necessarily differentiate along racial lines. *Griggs*, 401 U.S. at 430-431; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 806. Prohibiting this form of discrimination, not mandating racial balance, is the object of the disparate impact analysis.

The bottom-line theory looses the concept of disparate impact from its rationale. Rather than focusing on particular practices to determine whether they fit the rationale of *Griggs*, the bottom-line theory focuses on the ultimate result of what may be a number of discrete practices, and the issue becomes purely one of numbers, abstracted from causes or reasons. The end result of the bottom-line theory is to accomplish precisely what § 703(j) was meant to preclude: the individual is ignored in favor of the goal of racial balance.

ARGUMENT

1. Title VII of the Civil Rights Act of 1964, as amended in 1972, is an anti-discrimination statute. More specifically, it is a statute designed to protect *individuals* against racial, religious, sexual and national origin discrimination in employment. As this Court has stated:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. [*Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708.][1]

As its means to that end, Title VII makes unlawful:

> "Disparate treatment" [which concerns instances wherein] the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin [and where] proof of discriminatory motive is critical * * * [; and] "disparate impact" [which] involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and can-

---

[1] The Act makes this focus on the individual manifest. Section 703(a), the basic provision defining unlawful practices of employers, provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail to refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin; or
>
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual's* race, color, religion, sex, or national origin. [Emphasis added.]

And § 706(g), the basic remedial provision of Title VII, provides for monetary and injunctive remedies for those "individuals" who have been proved to be victims of violations of § 703.

> not be justified by business necessity [and where] proof of discriminatory motive * * * is not required * * *. [*Teamsters v. United States*, 431 U.S. 324, 335-336 n. 15.]

It is equally plain that Title VII does *not* require employers to achieve a racial balance in their workforces. Section 703(j) of the Act expressly states:

> Nothing contained in this title shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race * * * of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race * * * employed by any employer * * * in comparison with the total number or percentage of persons of such race * * * in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Thus, ending "discriminat[ion] because of race," not achieving racial balance, is the command of Title VII.

2. In this case, both courts below found that four black plaintiffs had been excluded from competing for a promotion by a written examination that has a disparate impact adversely affecting blacks. Subsequent to their exclusion, the state agency that is the employer in this case, applying, as the court below found (645 F.2d at 135), the agency's "affirmative action program," promoted enough *other* blacks from among those who had passed the test so as to make the proportion of blacks promoted even greater than the proportion of blacks that had initially applied for the promotion. The question presented is whether the promotion of these other blacks extinguished the claims of the four plaintiffs here that they were victimized by the discriminatory examination. The court of appeals held that the plaintiffs' claims were *not* extinguished.

Under the "bottom-line" theory, urged upon this Court by the State (the employer) and by the United States as the basis for reversing the court of appeals, acts of discrimination against individuals in promotion—at least where the discriminatory act is of the type dealt with under the disparate impact doctrine—are to be countenanced if an appropriate racial balance among those promoted is nevertheless achieved.

Such a balance may result when the numerical effects of the discriminatory conduct are offset not by employer action directed toward achieving such an offset but by the coincidences of a particular promotion process. In that context, the individuals excluded by a discriminatory practice would, under the bottom-line theory, lose their claims because a sufficient number of others of their race happened, by random fortune, to have been promoted.

Such a balance may also result—as is apparently the situation here and therefore the one we focus on—where racial balance is the employer's desired end, and it is achieved by disparate treatment victimizing whites. In that context, the bottom-line theory posits that acts having a disparate impact on individuals in one racial group are to be tolerated under Title VII if they are offset by acts of disparate treatment in favor of different individuals of that racial group and against individuals of another racial group.

Thus, in this case, the theory would mean that individual blacks victimized by a discriminatory test must go without a remedy because *other* blacks, not so victimized, were given a promotion as a result of discrimination against whites.[2] The theory thus reduces in this setting to the proposition that two wrongs make a right; a statute designed to prohibit and remedy discrimination against in-

[2] The employer in this case is a governmental agency. Consequently, any racial discrimination against whites would raise constitutional as well as statutory questions. See *Minnick v. California Department of Corrections*, —— U.S. ——, 49 L.W. 4609, 4611-4613; *Steelworkers v. Weber*, 443 U.S. 193.

dividuals, not to achieve racial balance, is turned into a statute that tolerates multiple acts of discrimination as long as the result is a racial balance.

3. This Court has on several occasions rejected the bottom-line theory as a defense to claims by victims of disparate treatment. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579, the Court addressed the relevance of the racial balance of an employer's work force to a claim by individuals that they had been refused hire because of their race:

> A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination. * * * It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs v. Duke Power Co.*, 401 U.S., at 430; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976).[3]

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[3] The Court in *Furnco* went on to rule that proof of a racially balanced work force could be relevant only to the issue of *intent*:

> Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree with the Court of Appeals that in this case such proof neither was nor could have been sufficient to *conclusively* demonstrate that Furnco's actions were not discriminatorily motivated, the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation. [438 U.S. at 580.]

See also *infra*, n. 5, pp. 12-13.

Similarly, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280-281, n. 8, the Court rejected the following claim made by the employer:

> Santa Fe, while conceding that "across-the-board discrimination in favor of minorities could never be condoned consistent with Title VII," contends nevertheless that "such discrimination . . . in isolated cases which cannot reasonably be said to burden whites as a class unduly," such as is alleged here, "may be acceptable." * * * We cannot agree. There is no exception in the terms of the Act for isolated cases; on the contrary, "Title VII tolerates no racial discrimination, subtle or otherwise."

And, in *Phillips v. Martin Marietta*, 400 U.S. 542, 543, the Court reversed a finding of summary judgment for the employer in a disparate treatment case, even though "at the time [the plaintiff] applied, 70-75% of the applicants for the position she sought were women [and] 75-80% of those hired for the position * * * were women * * *."

4. The proponents of the bottom-line theory urge that the result should be different when the individual's claim of discrimination concerns a *disparate impact* violation, rather than a disparate treatment violation. The analytic error that underlies this attempted distinction is the implicit assumption that the prohibition against disparate impact serves a different statutory purpose from that served by the prohibition against disparate treatment. Those who advocate the bottom-line theory proceed as if disparate impact analysis is a means for achieving appropriate racial balances, rather than a means to prohibit and to remedy a particular type of discrimination against individuals. On that premise, they justify focusing solely on the bottom-line numbers that result from a series of promotion decisions and ignoring the complex process that led to those numbers and to the effects that the process had on the individuals involved.

On this view, the disparate impact doctrine is at war with the basic approach of the statute. See *supra*, pp.

4-5. But disparate impact analysis is not simply a numbers game; as *Griggs v. Duke Power Co.*, *supra*, and its progeny show, it is designed to address a particular and subtle form of employment discrimination.

In *Griggs*, this Court explained the rationale of disparate impact analysis. At issue in that case were written aptitude tests and a high school diploma requirement that the employer used as prerequisites to certain jobs. These requirements seemed "neutral on their face," but the record showed that " 'whites register far better on [these] requirements' than Negroes." 401 U.S. at 430. The Court found that "consequence * * * to be directly traceable to race. * * * Because they are Negroes, petitioners have long received inferior education in segregated schools * * *." *Ibid.* The Court also found that "neither the high school completion requirement nor the general intelligence test [had been] shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* at 431. Within these parameters, the Court defined the nature of the violation:

> [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. [*Id.* at 430-431.]
>
> * * *

Following *Griggs*, this Court has repeatedly refused invitations to extend the disparate impact doctrine beyond its rationale. Thus, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805-806, the Court, in disapproving a lower court's application of the *Griggs* analysis to rejection of an employment application of an individual who had

participated in unlawful conduct directed against the prospective employer, described the rationale of that analysis in the following way:

> The court below appeared to rely upon *Griggs v. Duke Power Co.*, *supra*, in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S., at 431. But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. [Footnote omitted.]

In *Manhart*, 435 U.S. at 710-711 n. 20, the Court rejected the contention that the result the Court found required by Title VII—adoption of a gender-neutral pension plan—

> would itself violate Title VII because of its disproportionately heavy impact on male employees. Cf. *Grigg v. Duke Power Co.*, 401 U.S. 424. * * * [U]nder Title VII * * * the male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.

Similarly, in *Furnco*, 438 U.S. 575, and n. 7, the Court ruled that a challenge to an employer's hiring process—which involved "not accept[ing] applications at the jobsite, but instead hir[ing] only persons whom [the job superintendent] knew to be experienced and competent in [relining blast furnaces] or persons who had been rec-

ommended to him as similarly skilled" (*id.* at 570)—was properly addressed under the disparate treatment, and not the disparate impact, analysis.

While this Court has not yet drawn the precise boundaries of the disparate impact analysis, certain limits are clear. The analysis is meant to address the class of employment practices, that, while not designed or adopted in order to discriminate on the basis of race, are predicated on factors that are "artificial, arbitrary, and unnecessary" and that, because they are "traceable to race" and therefore "beyond [the] control" of the disadvantaged individuals, necessarily differentiate along racial lines. *Griggs*, 401 U.S. at 430-431; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 806. Prohibiting this form of discrimination, not mandating racial balance, is the object of the disparate impact analysis.[4] Disparate impact analysis is not meant to address the myriad of other employment practices that may result in a numerical or proportional disparity between the races in an employer's workforce, but that are not predicated on the factors set out in *Griggs* and its progeny.

The bottom-line theory looses the concept of disparate impact from its rationale. Rather than focusing on particular practices to determine whether they fit the rationale of *Griggs*, the bottom-line theory focuses on the ultimate result of what may be a number of discrete practices, and the issue becomes purely one of numbers, abstracted from causes or reasons. If the numbers are in balance—*i.e.*, the races are in their "appropriate" proportions—the plaintiffs lose, regardless of the practices that may have led to that result. The end result of the

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[4] For another example of factors "beyond [the] control" of the disadvantaged individuals and "traceable to race [or sex]" that this Court has recognized are suitable for the *Griggs* analysis, see *Dothard v. Rawlinson*, 433 U.S. 321 (height requirements and weight requirements in a sex discrimination case).

bottom-line theory is to accomplish precisely what § 703 (j) was meant to preclude: the individual is ignored in favor of the goal of racial balance.

The black plaintiffs in this case have shown that the test that caused them to be excluded from consideration for a promotion had the *same* discriminatory character as the tests in *Griggs*. They are no less victims of discrimination than the plaintiffs in *Griggs*. And while the State implies that victims of disparate impact discrimination should be distinguished from victims of disparate treatment discrimination, we cannot fathom the basis for that distinction and no such basis appears in the Act or in this Court's Title VII decisions. Title VII requires a remedy for the individual victims of disparate impact discrimination as well as for the individual victims of disparate treatment discrimination. To repeat the words of *Furnco*, "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." See *supra*, p. 7.[5]

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[5] That the bottom-line is not the proper place to focus in a disparate impact case is confirmed by the fact that a racial *disproportion* in the bottom-line numbers in a case such as this could not constitute proof of a disparate impact violation. It is important in understanding why this is so to distinguish the role that bottom-line numbers play in a *disparate treatment case* from the role those numbers play in a *disparate impact case*. In certain circumstances, depending on the nature and complexity of the employment process, a significant racial disparity in the bottom-line numbers may fairly lead to an inference of intentional discrimination and thus constitute an important part of a prima facie case of a disparate treatment violation. See, *e.g.*, *Teamsters v. United States*, 431 U.S. 324. In *Teamsters*, the Court rejected an argument that to look at overall statistics in that context would conflict with § 703(j):

> The argument fails in this case because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially

> balanced. Statistics showing racial or ethnic imbalance are *probative* in a case such as this one *only because* such imbalance is often *a telltale sign of purposeful discrimination*; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of *longlasting and gross disparity* between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. [431 U.S. at 339-340, n. 20; emphasis added.]

Implicit in § 703(j)'s ban on requiring racial balance and in the reasoning of the quoted passage is the proposition that § 703(j) *does* bar reliance on racial disproportions in the bottom-line numbers in non-intent cases. For if a showing of racial disproportion in the bottom line without more is sufficient to prove a violation, the very purpose of § 703(j) would be defeated.

Moreover, where the bottom-line numbers are the sum of the effects of a *variety* of *intermediate practices*, the fact that those numbers reveal a racial disproportion would not prove a violation with respect to any particular practice. The bottom-line result might merely show the aggregate effects of a number of practices each of which on its own is entirely proper. Even if that is not so, there would from the final numbers be no way of knowing whether any particular practice had a differential impact on the races and, if so, whether that practice has the qualities that would bring it within the rationale of *Griggs*. Indeed, there would be no way of knowing whether the bottom-line disparity resulted, not from a facially race-neutral practice, but from acts of intentional discrimination. This is because all acts and practices that may have led to the bottom-line result would be lumped together, regardless of the nature of those acts and practices. Practices that might be challenged as disparate impact violations and those that might be challenged as disparate treatment violations would not be isolated and treated in accordance with the distinct criteria for assessing each type of challenge. Compare *Dothard v. Rawlinson*, 433 U.S. at 329, with *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-803. The end result would be a case constituted by numbers that do not establish discrimination and have no significance apart from the issue of racial balance. That is what § 703(j) forbids.

CONCLUSION

For the above-stated reasons, the judgment of the Second Circuit should be affirmed.

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